92-1825

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

M.K. PETERSON,

Petitioner,

vs.

RAUSCHER, PIERCE, REFSNES, INC. and
RICHARD F. JUBA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an arbitration panel that was appointed in violation of the parties' agreement and in violation of the NYSE's Arbitration Rules can render a valid arbitration award?

2. Whether manifest disregard of the law is a viable ground for vacating an arbitration award and, if so, did the arbitrators' statements that they were not bound by the law and the arbitrators' acknowledgment of, but refusal to apply the law constitute manifest disregard of the law?

3. Does the evident partiality basis for vacating an arbitration award set forth in 9 U.S.C. §10(a) require a showing that an arbitrator had a financial interest in the outcome or a special relationship to a party, and if not, did the arbitrators' pre-judgments on the merits, open hostility to Petitioner, and refusal to hear pertinent evidence constitute evident partiality?

4. Is a party to an arbitration proceeding entitled to due process, and, if so, was Petitioner denied due process?

LIST OF PARTIES

Petitioner - M.K. Peterson

Respondents - Rauscher, Pierce, Refsnes, Inc., Richard F. Juba

Other Defendant in the case below - New York Stock Exchange, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Fifth Circuit, rendered in these proceedings on January 14, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is reproduced in the Appendix at 1A.

JURISDICTION

This Court has jurisdiction to review the opinion and judgment of the Court of Appeals pursuant to 28 U.S.C. §1254. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were rendered on January 14, 1993. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on February 17, 1993. This Petition is filed within ninety (90) days of that date as required by 28 U.S.C. §2101(c) and Sup.Ct.R. 13.4.

STATUTES AND RULES INVOLVED IN CASE

9 U.S.C. §10.
New York Stock Exchange Rule 609.
New York Stock Exchange Rule 611.

The above statute and rules are set forth verbatim in the Appendix attached hereto.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This is a securities arbitration case. On March 26, 1991, a five-member arbitration panel convened by the New York Stock Exchange ("NYSE") found in favor of the brokerage firm Rauscher, Pierce, Refsnes, Inc. ("RPR") and its employee Richard F. Juba ("Juba"), and denied any relief whatsoever to Plaintiff Peterson. The district court refused Peterson's Motion to Vacate the Award. Peterson then appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit"). In an opinion dated January 14, 1993, a Fifth Circuit panel affirmed the district court's decision. The Fifth Circuit thereafter denied Peterson's Petition for Rehearing and Suggestion for Rehearing En Banc.

B. FACTUAL BACKGROUND

1. *Basic controversy heard by the arbitrators*

Peterson commenced an arbitration proceeding against his stockbroker Juba and Juba's employer, RPR. The complaint was that Juba had recommended, in April 1987, that Peterson engage in a complex and risky transaction that was unsuitable to a 67-year-old man whose agreed investment objectives were the most conservative categories available. Peterson asserted that Juba had misrepresented and failed to disclose important characteristics of the transaction, that RPR had failed to supervise the transaction, and that Juba had failed to properly close the transaction. The Statement of Claim alleged negligence, breach of fiduciary duty, breach of Respondents' agreement to make no unsuitable recommendations and securities fraud.

In the arbitration (21 days of hearings, generally in one and two-day increments, completed *3-1/2 years* after the claim was filed), the following points were established:[1]

1. Juba admitted that Peterson's account documents at RPR correctly reflected Peterson's conservative investment objectives (Juba at 1454).

2. In April 1987, Juba devised and recommended to Peterson a complex, speculative transaction (1597-1602, 1674-77, 2157-58), which Juba admitted was inconsistent with Peterson's objectives as reflected in the account documents (1663-64). Juba's plan was that Peterson sell puts on 52,000 shares of Sun stock (i.e., 520 contracts of 100 shares each), exposing Peterson to the risk that he would be obligated to purchase 52,000 shares of Sun stock at a price of $3,380,000. Over 90% of Peterson's

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[1] All page citations are to the verbatim transcript, consisting of 21 full volumes of proceedings before the panel, plus a 17-page excerpt (labelled "EXCERPT FROM PROCEEDINGS HELD ON JULY 11, 1990") which was heard outside the presence of the panel.

portfolio was already invested in Sun stock. The effect of the recommendation was to take a person who already had almost all his net worth in a single security and approximately double his concentration in it.

3. Juba admitted he failed to disclose that immediately upon executing the strategy that Peterson would suffer a $200,000 margin call (1796-98), that Peterson would account for the entire market in the puts at the time he wrote them (1453, 1845-46), and that the strategy was the functional equivalent of borrowing over $3 million to double his holdings in Sun stock (1660, 1669, 1671).

4. All experts agreed that the recommended transaction was extremely rare because of its enormous risk.[2]

5. Juba's strategy used a position 26 times as large as any position in Sun puts that Peterson had previously taken in this account (1665) and combined it with another strategy (the purchase of calls), which Peterson had never used in his account at RPR, rendering the strategy even more aggressive (1641).

The strategy was intrinsically unsuitable for a retired man who was entirely dependent for his livelihood on the income from his portfolio. Certain risks of the transaction arose because of its size - it was unwieldy to escape and it was the most dangerous when Peterson's existing Sun stock portfolio was weakest. The strategy was so rare and complex that it was impossible for a retail customer, even one like Peterson with some prior options

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[2] Juba had never worked on a puts transaction even approaching the size of this transaction (1464-1471). The assistant branch manager of Juba's office had *never* seen such a large puts transaction in his 10 years of reviewing trades at this 30-broker office of RPR (3025). The branch manager had seen such a large transaction in puts only 2 or 3 times in his career, each time by a customer "substantially stronger" than Peterson (2558-2559). Respondents' expert (Dorsey) testified that, during the time he oversaw all options trading at a *500 broker* firm, he would typically see such a large transaction in puts only once a year, typically for a very substantial family that actually controlled the company in which the trading was done (4596-4597).

experience, to fully appreciate all of the risks. **Juba should never have recommended it**. The fact Peterson accepted the transaction based upon his trust in Juba could not relieve Juba of his undertaking in the Customer Option Agreement to "only make recommendations that are not unsuitable," nor of his duties to exercise reasonable care. Juba's recommendation carried with it the implicit representation that it was suited to Peterson's needs and objectives; that representation was fraudulent.

Juba and RPR also obstructed exit from the position. Peterson immediately complained of the position and asked for help from Juba in devising a strategy to exit it. Juba recommended postponing exit (574 [Vol. III]). Finally, Peterson insisted on exiting the position in late September, 1987 as he was preparing to leave for remote parts of northern Michigan. Juba never carried out this order (431-32 [Vol. II]). *Even Juba's own expert Dorsey* testified that Juba was flatly wrong in describing how his exit plan would work. (4644-56 and 4694-95) Juba incompetently assembled a strategy that was very unlikely to accomplish exit from the position.

When Peterson returned to Dallas and learned on October 7, 1987 that the position remained open, he complained loudly and asked to meet with Juba's manager (434-36 [Vol. II], 1249-52). Juba hid that information from management (1252-53), violating RPR's rules as well as the industry standards (1253-54). Prior to the October 19, 1987 market crash, Peterson sent a registered letter to Juba and RPR complaining of their malfeasance, and holding them responsible for the position (448 [Vol. II]). RPR replied that the position was Peterson's problem (456 [Vol. II]). A few days later, Peterson lost approximately $900,000 on the position in the market crash. (3943-44 and Exh. 70)

2. *History of the arbitration proceeding*

The arbitration Statement of Claim was filed in November, 1987. The first hearing occurred August 23, 1988. At that hearing, the bias of the arbitrators was so flagrant that

Peterson and his counsel were forced to request that the panel cease the proceeding because of its bias. Peterson and his counsel asked for an opportunity for court review as to their power to decide the case. The arbitrators refused any postponement and proceeded with the second day of hearings. Before the next scheduled hearing (approximately 2-1/2 months later), Peterson obtained a temporary restraining order from state district court, enjoining further arbitration proceedings. Thereafter the injunction was lifted and the arbitration continued. Throughout the 21 days of hearings, the arbitration panel repeatedly expressed its views favoring the broker's case, criticized Peterson for his trust of the broker, and repeatedly refused to accept settled principles of law. Finally on March 26, 1991, the panel rendered the award: it denied Peterson's claims without explanation.

3. *Composition of the panel*

In the original brokerage account documents, the parties had agreed that any disputes would be resolved through arbitration before the NYSE in accordance with the NYSE's arbitration rules. Pursuant to Rule 607, the NYSE appointed 5 arbitrators, 3 of whom were not from the securities industry. During the first of 21 hearings, the panel's bias and unjudicial hostility was flagrant. Thereafter, in 1990, two of the non-industry panelists (Brotman and Bonime) voluntarily withdrew after nine days of hearings. The NYSE named Eugene Zorn to replace the withdrawn Brotman, but Zorn was excused due to Plaintiff's exercise of a peremptory challenge. Dr. Carroll Galbreath was then appointed to replace Brotman, without challenge. The NYSE initially named Joe Shepherd as Bonime's replacement, but Shepherd was excused due to Plaintiff's exercise of a peremptory challenge. Jeffrey Ritter was then appointed to replace Bonime. At the next hearing, however, Ritter voluntarily withdrew because of the apparent length of the case. The *NYSE then named to replace him the two persons whom Plaintiff had previously peremptorily challenged (Zorn and Shepherd)* nullifying the prior peremptory challenges in violation of NYSE Rules 609 and 611. Peterson's counsel objected both to this

circumvention of the peremptory challenge rules and also to NYSE's refusal to allow a *de novo* hearing. The two new panelists had not heard the testimony of the first nine days of hearings and had not adequately reviewed the prior testimony. The proceedings, however, continued over Plaintiff's objection, even before the two panelists had read the transcripts of Plaintiff's case adduced during the prior 9 days. Thus, Peterson's case was decided by arbitrators appointed in violation of the NYSE's rules, who heard the case out of order through a combination of cold transcript (as to most of Claimant's case) and live testimony (as to most of Respondent's case).

REASONS FOR GRANTING THE WRIT

A. NYSE'S VIOLATION OF ITS RULES RENDERS THE ARBITRATION AWARD INVALID AND THE FIFTH CIRCUIT'S REFUSAL TO VACATE ON THESE GROUNDS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

As detailed below, other Circuit Courts of Appeals, including the Second, Seventh, Eighth, and Eleventh Circuits, have concluded that an award rendered by an arbitration panel appointed in violation of the parties' arbitration agreement is invalid. In this case, Peterson, RPR, and Juba agreed that the arbitration panel would be appointed in compliance with the NYSE's rules; those rules were not followed. Consequently, the Fifth Circuit should have vacated the arbitration award. Arbitration is playing an increasingly important role in resolution of disputes; therefore, it is imperative that this Court resolve the conflict between the Fifth Circuit and other Circuits on the necessity of strictly complying with the parties' agreement in choosing an arbitration panel.

As stated above, after 9 days of hearings, two of the five arbitrators withdrew. The NYSE initially acknowledged Peterson's peremptory challenge rights; however, the NYSE later negated these rights by naming two persons, both of whom had

previously been peremptorily challenged by Peterson, as the only choices to replace a third arbitrator who withdrew from the panel. Forcing Peterson to choose between two panelists he had already peremptorily challenged, clearly violated the NYSE's rules. Consequently, the arbitration panel, improperly constituted, had no power to render a valid award.

Numerous Circuit Courts of Appeals have invalidated arbitration awards rendered by improperly composed arbitration panels. For example, in *Avis Rental Car System, Inc. v. Garage Employees Union,* 791 F.2d 22 (2d Cir. 1986), the court vacated an arbitration award rendered by an improperly appointed arbitrator. The court held:

> The arbitrator was designated by the Mediation Board as called for by the Association Agreement; he was not chosen under the AAA rules specified in Article XX of the Avis agreement. The defect in the method used to select him left him powerless to implement the Avis agreement. An arbitrator may have the final say on certain issues that affect the power to enter an award, but an award will not be enforced if the arbitrator is not chosen in accordance with the method agreed to by the parties. *Tamari v. Conrad*, 552 F.2d 778, 781 (7th Cir. 1977).

Id. at 25.

The Second Circuit expressly held that the *appellant was not required to show it was prejudiced* by proving that the AAA rules (as agreed to by the parties), were better or otherwise preferable to the Mediation Board rules. The Second Circuit found that the district court's conclusion to the contrary was flawed as follows:

> First, it fails to acknowledge that arbitration depends on the consent of the parties to the contract. Under Article XX of the Avis agreement, the union in Avis agreed to binding arbitration only by a person selected under the AAA rules. Courts generally enforce such

> clauses strictly, vacating awards entered by arbitrators whose qualifications or method of appointment failed to conform to arbitration clauses. *See Food Handlers, Local 425 v. Pluss Poultry, Inc.*, 260 F.2d 835 (8th Cir. 1958) (arbitration panel composed of one agency-appointed and one union-appointed panel of three); *El Vocero de Puerto Rico v. Union de Peridistas*, 532 F.Supp. 13 (D.P.R. 1981) (arbitrator resigned from bureau when contract contemplated he would remain employed by it); *Local 27, International HOD Carriers v. Sullivan*, 221 F.Supp. 696 (E.D. Ill. 1983) (single agency-appointed arbitrator when contract specified five member panel jointly selected by union and employer).

Id. at. 25.

Applying the same reasoning, the Eleventh Circuit vacated an award rendered by an improperly constituted panel. *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830 (11th Cir. 1991). In *Szuts*, the arbitration agreement provided that "[a]ny arbitration hereunder shall be before at least 3 arbitrators... ." *Id.* at 830. After one of the three arbitrators was removed, the remaining two panelists rendered an award, despite appellant's objection. The Eleventh Circuit vacated the award holding:

> Because the arbitrators violated the provisions of the arbitration agreement requiring arbitration before at least three arbitrators, they exceeded their authority under the arbitration agreement. So, we vacate the award of the panel... .

Id. at 832.[3]

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[3] The court also noted that the fact that the agreement authorized the majority of the three-member panel to render an award did not validate the award by the two arbitrators, even though they technically constituted a majority of the original panel. *Id.* at 831 n.3. This conclusion is consistent with the court's strict construction of rules relating to panel appointments.

The Fifth Circuit's refusal to vacate the arbitration award in this case is directly contrary to the precedent of *Szuts* and *Avis*. Peterson and the Respondents executed a Submission Agreement stating they "agree and understand that the arbitration will be conducted in accordance with the constitution, bylaws, rules, regulations, and/or code of arbitration procedure of the sponsoring organization." The NYSE constituted Peterson's panel in violation of its rules and the parties' agreement.[4] Accordingly, the panel lacked authority to render a valid arbitration award. *Szuts*, 931 F.2d at 832; *Avis*, 791 F.2d at 25.

This result is supported not only by the contractual nature of an arbitration action, but also by the fact that the selection of the arbitration panel is one of the most critical procedures in the arbitration process. The need for protection of the selection process in an arbitration proceeding is even greater than in the judicial arena because the parties to an arbitration proceeding have a very limited ability to challenge an arbitration award, and the arbitrators have no duty to explain their decision. The need for strict compliance with the selection process is further heightened when the NYSE or any other self-regulating organization is the arbitration forum because the public justifiably perceives an institutional bias in these forums.[5]

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[4] NYSE Rule 609 regarding peremptory challenges and Rule 611 (as existing when the arbitration was commenced) provide that upon withdrawal of a panelist, the NYSE shall appoint a replacement "obtaining the consent of the parties." A copy of the relevant rules are attached at pages 6A through 8A of the Appendix. Rule 611 was amended effective May 10, 1989. Under this new rule, a copy of which is attached at page 8A of the Appendix, the NYSE was not required to obtain the parties' consent to a replacement panelist, but the new rule preserved the parties' right to one peremptory challenge for each replacement. Consequently, under either version of the rules, the NYSE improperly appointed the last replacement panelist.

[5] This Court has cited peremptory challenge rules as a non-industry claimant's guard against potential institutional bias in securities arbitration proceedings. *Gilmer v. Interstate v. Johnson Lane Corp.*, 111 S.Ct. 1647, 1654 (1991)(dismissing Gilmer's challenges to the adequacy of arbitration procedures, noting that the NYSE's peremptory challenge rule gives a claimant procedural protection enabling him to shape his panel); *Shearson/American*

In addition to the violation of the NYSE's peremptory challenge rules, the midstream appointment of two panelists effectively excluded evidence presented during the prior 9 days of hearings. Although the NYSE rules do not specifically address this point, those rules must be construed to require a *de novo* presentation of the evidence in the event a panel member is replaced during an arbitration proceeding. This result is mandated by the Federal Arbitration Act (the "FAA"), which requires vacatur for "refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. §10(c). *See Hoteles Condado v. Union De Tronquistas*, 763 F.2d 34, 40 (1st Cir. 1985)(holding that even if evidence is technically admitted, vacatur under §10(c) is required where the evidence is effectively excluded from consideration). Evidence was effectively excluded in Peterson's case. Not only were the new panelists dependent on a cold transcript of the first 9 days of hearings, their admitted lack of preparation made it virtually impossible for them to comprehend the evidence they actually heard.[6] *See Jones v. St. Louis-San Francisco Railway Company*, 728 F.2d 257, 263-64 (6th Cir. 1984)(emphasis added)(holding that "Congress intended for *all* the arbitrators to hear the proof and evidence...[and] [o]nly after this procedure has been followed can a decision by the majority of the board be deemed a valid award.").

Based upon the foregoing, a writ of certiorari should issue to review the Fifth Circuit's judgment rendered in these

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Express, Inc. v. McMahon, 482 U.S. 220, 260 and n.19 (1987)(Blackmun, J., concurring in part and dissenting in part, recognizing "the investor has the impression, frequently justified, that his claims were being judged by a forum sympathetic to the securities industry," but that a claimant's "right" to a peremptory challenge serves as one of the safeguards against such industry bias, as does the assurance that a majority of the panel must be composed of persons from outside the industry).

[6] One of the replacement panelists, Galbreath, had only read two of nine volumes of transcript, and had scanned many, but not all of the remaining volumes, prior to his hearing evidence on the tenth day (2243). Panelist Shepherd had an ever poorer introduction to the case. He had read the first two volumes of transcript, but he had not even received, much less read, the pleadings in the case. (2332)

proceedings. Assuring that arbitrators are properly selected and that self-regulating organizations such as the NYSE follow their rules are central to maintaining the integrity of the arbitral process and to maintaining public confidence in that process. The exceptional importance of these questions justify consideration by this Court.

B. THE FIFTH CIRCUIT'S REJECTION OF MANIFEST DISREGARD OF THE LAW AS A BASIS FOR VACATUR IS CONTRARY TO PRECEDENT OF THIS COURT AND CONFLICTS WITH OTHER CIRCUITS.

Supreme Court precedent establishes that an arbitration award should be vacated on a showing of "manifest disregard of the law" by the arbitrators. This Court announced this judicially created ground for vacating an arbitration award in *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled on other grounds, Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Although portions of the *Wilko* opinion have been rejected, the manifest disregard ground for vacating an award remains viable.

In *Mitsubishi Motors Corp. v. Soler Chrysler/Plymouth*, 473 U.S. 614, 628 (1985), this Court assured parties to an arbitration that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statutes; it only submits to the resolution in an arbitral rather than a judicial forum." Likewise, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (emphasis added), this Court stated, "finally, we have indicated that there is no reason to assume at the outset that the arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, *such review is sufficient to ensure that arbitrators comply with the requirements of the [securities] statute.*"[7]

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[7] Justice Blackmun wrote in *McMahon* that, "[j]udicial review is still substantially limited to the four grounds listed in §10 of the [Federal] Arbitration Act *and to the concept of 'manifest disregard' of the law.*"

Similarly, in *Rodriguez De Quijas v. Shearson/American Express*, 490 U.S. 477, 109 S.Ct. 1917, 1920 (1989), this Court reiterated that consent to arbitration is purely a choice of forum and does not "weaken the protections afforded in substantive law." Only by engaging in a review for manifest disregard of the law can a court give effect to this Court's assurance that arbitrators must comply with the securities statutes and other substantive law.

It is difficult to imagine a more blatant example of "manifest disregard of the law" than that suffered by Peterson. The arbitrators openly stated that they were not obligated to apply securities laws, considering them irrelevant. Likewise, the arbitrators made it clear they believed any level of negligence by the customer would preclude recovery on all theories. This "the buck stops with the customer" view is obviously contrary to federal securities law. *See Stephenson v. Paine Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988)(holding that recklessness, rather than negligence must be shown to constitute a bar to Plaintiff's recovery under securities law). The panel further chose to ignore the broker's breach of his contractual duties to "make no unsuitable recommendation" and his contractual duty to execute orders given by Peterson.

During the arbitration proceedings, it became increasingly clear that the arbitration panel did not intend to be bound by the governing law. Panelist Brackbill unequivocally stated: "We stated that we are not governed by the law. We are an arbitration panel. I am sure you have read the NYSE rules." (4085) Mr. Brackbill further stated: "My problem is that fraud-we are using this word "fraud" very loosely with this panel, because we are not bound by the law in arbitration." (4117) When Peterson's counsel attempted to explain that the recommendation to purchase a security, if recklessly made, can constitute securities fraud, Mr. Brackbill stated: "According to

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McMahon, 482 U.S. at _____, 107 S.Ct. at 2355 (Blackmun, J., dissenting in part, emphasis added).

securities law, but we are not bound by that." (4118) The panelist thus blatantly stated that he did not have to comply with the securities law.

The arbitration process afforded Peterson flies in the face of this Court's assurance that judicial review "is sufficient to ensure that arbitrators comply with requirements of the [securities] statute." *McMahon*, 482 U.S. at 232. Based on the arbitrators' statements that they intended to disregard the law, Peterson's case presents an unusually clear example of manifest disregard of the law.

It appears the Fifth Circuit did not conduct a manifest disregard review in this case. This is supported by the fact that the only published Fifth Circuit opinion on this issue at the time the Fifth Circuit rendered its judgment had declined to recognize manifest disregard of the law as a viable ground for vacating an arbitration award. *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534 (5th Cir. 1992). In *R.M. Perez*, the court initially recognized and applied the manifest disregard doctrine in reviewing an arbitration award. *R.M. Perez & Associates, Inc.*, 1992 W.L. 83799 (5th Cir. May 13, 1992). The court later withdrew its original opinion, and rejected the manifest disregard doctrine. *R.M. Perez*, 960 F.2d at 539.

In conflict with the Fifth Circuit's position, several Circuit Courts of Appeals have recognized manifest disregard as a ground for vacating an award. *See e.g. Folkways Music Publishers, Inc. v. Weiss*, No. 929, Docket 92-9061 (2d Cir. March 26, 1993)(1993 WL 86935); *A.G. Edwards & Sons, Inc. v. McCullough*, 967 F.2d 1401 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 970 (1993); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175 (D.C. Cir. 1991); *Chameleon Dental Prods., Inc. v. Jackson*, 925 F.2d 223 (7th Cir. 1991); *Advest, Inc. v. McCarthy*, 914 F.2d 6 (1st Cir. 1990); *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631 (10th Cir. 1988). Other Circuits reject the manifest disregard doctrine. *See e.g. McIlroy v. Paine Webber, Inc.*, No. 91-7126 (5th Cir. May 3, 1993)(1993 WL 116092); *R.M. Perez*, 960 F.2d 534 (5th Cir. 1992);

Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1269(1993); *Robbins v. Day*, 954 F.2d 679 (11th Cir.), *cert. denied*, 113 S.Ct. 201 (1992). This split in the Circuits, in light of this Court's assurance that arbitrators would comply with securities laws, substantiates the need for issuance of a writ of certiorari in this case.

C. THE FIFTH CIRCUIT ERRED BY CONCLUDING EVIDENT PARTIALITY REQUIRES A SHOWING OF AN ARBITRATOR'S PECUNIARY INTEREST IN THE OUTCOME OR ACTUAL RELATIONSHIP WITH A PARTY.

It appears the Fifth Circuit narrowly limited the "evident partiality" basis for vacating an award to instances in which an arbitrator had a financial interest in the outcome or a special relationship with one of the parties. This is contrary to precedent from other Circuits.

Section 10 of the FAA (9 U.S.C. §10) provides in pertinent part that a court may vacate an award "where there was evident partiality or corruption in the arbitrators, or either of them."[8] The statute incorporates substantial protections on the fairness of process. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968), Justice Black stated that the rules governing arbitrations rest on the same premise as the canons of judicial ethics, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Id.* at 149-150, 89 S.Ct. at 339-340.

Precedent from the Second and Seventh Circuits further supports the conclusion that vacatur for "evident partiality" under Section 10(b) is not limited to instances where the arbitrators have a financial interest in the outcome. Where verbatim transcripts are available, the review of what the arbitrator did and

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[8] A copy of the statute is attached hereto at page 5A of the Appendix.

said in the hearing itself is the most important evidence of the arbitrator's partiality.

In *Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196 (7th Cir.), *cert. denied*, 449 U.S. 873 (1980), the same firm that employed one of the arbitrators hired as an employee a witness of one of the parties. The involved arbitrator withdrew and the question was whether his earlier presence on the panel had tainted the remainder of the committee. The Seventh Circuit carefully reviewed the transcript for any appearance of bias, stating the award should be vacated "where one or more arbitrators might reasonably be thought biased against one litigant and favorable to another." *Id.* at 1198. It further stated that "even if actual bias or corruption is not found, the appearance of bias will void the award." *Id.* at 1198, n. 3.

Similarly, the court in *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, Intern. Union, United Auto, Aerospace and Agr. Implement Workers of America*, 500 F.2d 921 (2d Cir. 1974), in studying a claim of evident partiality, inquired whether there was evidence that "the arbitrator was biased or prejudiced, that he was predisposed to favor either party, or that he acted out of any improper motives." *Id.* at 923.

The analysis of the Seventh Circuit, in *Tamari*, and the Second Circuit, in *Bell Aerospace*, reveals that evident partiality is not limited to an arbitrator's financial interest in the outcome or special relationship to one of the parties. Rather, evident partiality can be found where the transcript reveals the appearance of bias. Perhaps the clearest opinion on this issue is *Holodnak v. Avco Corp.*, 381 F.Supp. 191 (D. Conn. 1974), *aff'd in part, rev'd in part on other grounds*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1985). In *Holodnak*, the court initially found it necessary to review the transcript, stating:

> [W]hen 'a claim of partiality is made, the court is under an obligation to scan the record to see if it demonstrates 'evident partiality' on the part of the arbitrators.' *Saxis Steamship Co. v. Multifacs International Traders, Inc.*,

375 F.2d 577, 582 (2d Cir. 1967); *Ballantine Books, Inc., v. Capital Distributing Co.*, 302 F.2d 197 (2d Cir. 1962).

Id. at 198. The Court then reviewed the transcript and found "substantial evidence of partiality on the part of the arbitrator, if not open hostility toward the plaintiff." *Id.* The arbitrator's bias reached a point that "at times the arbitrator openly badgered the plaintiff." *Id.* The court concluded that the arbitrator's comments and conduct revealed bias, requiring vacatur. *Id.* at 199. As is detailed more fully below, the arbitrators' hostility toward Mr. Peterson and the badgering suffered by him greatly exceeds that condemned in *Holodnak*.

The panel's inexplicable personal animosity toward Peterson was obvious just 45 pages into the testimony of Peterson. In describing his reliance upon his prior advisor Herb Vest, Mr. Peterson testified that Herb Vest *"sort of shied away" from the use of puts*. (285) Panelist Brackbill, hurriedly flipping through account statements, rudely interrupted, attempted to make the witness take a more extreme position, suggested that Peterson is a liar, and volunteered that he, the panelist who is supposed to be impartial, "will embarrass you."[9] Brackbill later

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PANELIST BRACKBILL [Page 285]:

Wait a minute. Is the answer is Mr. Vest did not recommend puts and you did not use puts?

MR. PETERSON:

No sir. My answer is simply this. Mr. Vest rarely did recommend puts along with the calls.

...

PANELIST BRACKBILL [Page 285]:

That's all I want to know. You keep saying you didn't use puts. I keep reading them.

MR. PETERSON: I didn't say.

PANELIST BRACKBILL: You said rarely?

MR. PETERSON: I also said Mr. Vest didn't like them.

...

MR. O'NEILL:

In defense I would like to note one thing. We have got a different exhibit for Mr. Vest where he hand posted the transactions.

looked at the account statements, came to realize that he was wrong as Peterson's counsel had tried to suggest to him and made a begrudging apology at the inception of the second day's hearing, off the record. The apology could not hide Brackbill's obvious rancor and partisanship.

Besides the panel's words, there were powerful demonstrations of panel bias impossible to capture by transcript - facial expressions, evidences of disbelief, and other signals sent by the panel on that first day, some of which were noted by Plaintiff at pages 329-30. The totality of panel conduct produced, on the morning of the second day, an extraordinary exchange in which the chief panelist told Peterson that he did not like Peterson's personality.[10]

PANELIST BRACKBILL:

I'm just using what you handed to me. *I'll do the whole year and embarrass you.* (Ends at page 288).

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PANELIST BRACKBILL:

That's my personality. *I don't like your personality.* I'm not going to use that to judge you.

MR. PETERSON:

All I'm asking for is an objective, honest member of this panel.

PANELIST BRACKBILL:

I want that in the record that you claim that I'm not honest.

MR. PETERSON: Sir.

PANELIST BRACKBILL: You said that I'm not honest.

MR. PETERSON:

All I want is an objective honest member of the panel. I want all members to be honest and objective. And also

PANELIST BROTMAN:

Are you claiming any one of us are not honest or objective?

MR. O'NEILL:

No sir. He is saying that there are two requirements. None of us have suggested you failed the honesty requirement. We have concerns about the objectivity requirement.

(350 Vol. II)

The panel attacked Peterson like a bully on the playground trying to pick a fight, taking every statement by the Plaintiff and his counsel, attempting to twist the statement into a personal attack on the panel, and looking for some excuse to start the punches flying. Brackbill's statement that he doesn't like the Plaintiff is the kind of statement that no hearing officer should ever make to a party; he made it after hearing Plaintiff's expert plus roughly 2 hours of direct testimony of the Plaintiff. How can a party present a case in that kind of atmosphere? The panel's vendetta continued throughout the arbitration.[11]

A fitting summary of the process afforded Peterson is illustrated when Plaintiff's counsel offers an expert study of the first several volumes of the hearing transcript (the Robbins Report), documenting the fact that the panelists should recuse themselves. Panelist Bonime's tirade is revealing:

PANELIST BONIME [Page 1711]:

> You are the ones that wrote letters to magazines in Dallas and national magazines calling us ignorant, biased, whatever. *You are rolling the dice. You may lose if you don't replace this whole panel. You are going to lose that crapshoot. That's my only point.*

Even before the arbitration panel displayed its hostility toward Peterson, the panel revealed its bias through its premature conclusions of fact stated in the *first day* of the 21-day hearing. The panelists violated one of the basic tenets of judicial behavior, reaching a conclusion based on something other than the evidence heard in the proceeding. *Ballantine Books, Inc. v. Capital Distributing Company*, 302 F.2d 17 (2d Cir. 1962) reviewed the circumstances under which statements of opinion prior to completion of the evidence raise questions of bias. There it

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[11] For example, when Plaintiff's counsel is proving that Juba has falsely marked the order tickets on Peterson's account, bearing on Juba's credibility as well as who has been truly managing the account, Guerin volunteered the defense that if the broker has been falsifying the order tickets and the client hasn't caught it, *it is the client's fault* (2165-66).

scrutinized an arbitration where the chief panelist, *on the ninth day of the hearing* said that "on the basis of the record as it then stood it was his tentative view that there should be an award" for a named party. The court tolerated those expressions of opinion only because the process was essentially already completed. *Id.* at 21. In Peterson's case, the panel expressions were rendered very early in the case, were contrary to the only evidence in the record, involved issues of Peterson's *intent*, and were accompanied by rejection of all evidence contrary to its predisposition.

This panel's misconduct began during the testimony of the first witness, Dr. Christopher Barry, an expert on the use of option strategies. Barry's function in the case was to lay a groundwork as to the operation of stock options, explain what Peterson's financial condition and previous investments revealed about Peterson's conservative objectives and needs, and contrast that background with the unusual strategy recommended by Juba. The panel's attacks and interruptions of Barry are particularly glaring because the core of his testimony--that the strategy recommended by Juba was unprecedented--was ultimately supported by Respondents' own witnesses.

During Professor Barry's direct examination, three members of the panel announced their conclusions regarding contested facts, directly contrary to the Professor's testimony, and unsupported by any evidence in the record. The panel's predisposition was that Peterson's true investment objective (i.e. state of mind) was speculative, contrary to Barry's testimony that Peterson's objectives and needs were conservative.[12] There was, however, absolutely no foundation in the record for their premature conclusion that Peterson was a speculator.

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[12] The panel so thoroughly communicated their rejection of Barry's testimony that Respondents conducted only a token cross-examination. The only non-employee expert called by Respondents (Dorsey) testified at pages 4489-4730. The panel *never* argued with him and interrupted only to ask respectful questions such as how to read an exhibit, never in an adversarial tone.

The panel had a predisposition that options trading is a fool's game. In the 16th hearing, Brackbill and Guerin decide, with the typical rancor shown to Plaintiff's witnesses, to disregard once again the testimony of one of Peterson's experts, Jim Bell, a broker who has substantial options experience with three different national brokerage firms. Bell attempted to show to the panel that different option trading carried different risks. The panelists incorrectly rejected this conclusion and effectively told Bell he did not know what he was talking about.[13] Bell later showed the panel that he was correct and they were mistaken. But the panel did not want to hear the evidence and did not want to hear Plaintiff's experts. It had made certain conclusions on the first day that any portfolio that contained options in any number or in any strategy was speculative, and it held that belief regardless of the evidence.

The foregoing examples show partiality - a fact finder rejecting the only probative evidence on important issues, due to its own hostility toward Peterson and its pre-set notions about options trading. The most cited analysis of the evident partiality standard is made in *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79 (2d

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PANELIST GUERIN [Page 3927]:

Doesn't the preamble of this document [speaking of the options clearing corporation risk disclosure statement described at page 3925] describe the whole option trading program as speculative?

MR. BELL:

It points out that they have special risks attuned to option trading and attempts to describe what each of the risk is in each - not each of the strategies. There are some strategies that are not covered.

PANELIST GUERIN:

Don't they think of all these as speculative strategies?

MR. BELL:

Not to my knowledge.

PANELIST BRACKBILL:

You are excused, but I suggest you go home and read that.

Bell later showed that the option clearing corporation prospectus expressly supported his position (3928).

Cir. 1984). The Second Circuit defined "evident partiality" as something more than a mere "appearance of bias", but held that "proof of actual bias" was not necessary. *Id.* at 84. It endorsed a careful scrutiny of the arbitrators' fairness.[14] *Morelite* concluded that "evident partiality within the meaning of 9 U.S.C. §10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 84.

A reasonable person reviewing the Peterson record must conclude that several of the panelists in this case were partial. This conclusion is compelled not only from the pre-judgments and personal hostility cited above, but also from repeated expressions by the panel of a personal dislike and distrust of Plaintiff. No party can obtain a fair hearing from a fact finder who has already decided the facts, or who has such hostility toward the litigant or toward his factual or legal position that the fact finder is unable or unwilling to hear the evidence. *Ballantine, supra*, stated that a jurist who expresses a view "which arises from the evidence" can avoid challenge for bias. But when a jurist, including an arbitrator, expresses premature conclusions on crucial fact issues, or such personal animus as to

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[14] The court stated:

> "On the other hand, we must not abjure our responsibility to maintain the integrity of the federal courts' role in affirming or vacating awards.... [T]he statutory scheme we examine today implicates the process of the federal courts in the enforcement of "private remedies". Were we to lend our imprimatur to an award grounded in fraud or bias, the sense of fairness that society rightfully demands of its judiciary would be sadly diminished. For this reason, we cannot countenance the promulgation of a standard for partiality as insurmountable as "proof of actual bias" as the literal words of Section 10 might suggest. Bias is often difficult, and indeed often impossible to prove."
>
> *Id.* at 84.

be unable to fairly consider the evidence, that jurist must be removed for bias.[15]

Review of the evident partiality issue is warranted. At the Fifth Circuit level, Respondents argued that, as a matter of law, an arbitration award could be vacated based on evident partiality only if an arbitrator had a pecuniary interest in the outcome or some other actual relationship with a party. In support of this, Respondents cited *Tinaway v. Merrill Lynch & Co., Inc.*, 692 F.Supp. 220, 224 (S.D.N.Y. 1988); *Sidarma Societa di Italiani Armamento SPA, Venice v. Holt Marine Indus., Inc.*, 515 F.Supp. 1302, 1306 (S.D.N.Y.), *aff'd*, 681 F.2d 802 (2d Cir. 1981); *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F.Supp. 1276, 1284 (S.D.N.Y. 1979). The Fifth Circuit opinion reveals no analysis whatsoever of the evident partiality issue. Only by applying a bright line (financial interest or special relationship) test, however, could the Fifth Circuit have determined evident partiality did *not* exist. This bright line approach to evident partiality is inconsistent with Second and Seventh Circuit opinions cited above. Moreover, this Court has not determined whether the bright line test championed

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[15] When Plaintiff's counsel asked Professor Barry to read aloud 3 pages of the broker's deposition transcript and evaluate whether the broker's statement is a correct understanding of options rules, the panel accused Plaintiff of trickery:

PANELIST BRACKBILL [Page 199]:

> If we haven't a chance to see in totality, it is unfair to hear a small portion of this. Were we furnished with this?

MR. COLLINS: No.

MR. O'NEILL: We are trying to give you a break.

PANELIST BRACKBILL:

> *You are trying to give us a biased side.* I want to know the whole story.

Later, Respondents' counsel asked questions of their expert based upon his reivew of some *undesignated* portions of Juba's deposition. The panel *allowed* such testimony (4502-03 and 4508), with no suggestion that Respondent or his witness was trying to give the panel "a biased side".

by the Respondents and apparently followed by the Fifth Circuit constitutes the correct evident partiality analysis. Consequently, Peterson respectfully submits that this Court should review this issue.

D. THE FIFTH CIRCUIT ERRED IN REFUSING TO VACATE THE ARBITRATION AWARD ON DUE PROCESS GROUNDS.

1. THE FIFTH CIRCUIT IMPROPERLY CONCLUDED THAT PETERSON WAS NOT ENTITLED TO DUE PROCESS.

The Fifth Circuit appears to have rejected Peterson's argument that he was entitled to due process during arbitration proceedings. On appeal, the Respondents cited Seventh and Eight Circuit opinions holding that a party is not entitled to due process in an arbitration. *See Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 268 (7th Cir. 1988)(arbitration is a system "structured without due process"); *Stroh Container Company v. Delphi Industries, Inc.*, 783 F.2d 743, 751 n.12 (8th Cir.)(same), *cert. denied*, 476 U.S. 1141 (1986). The Fifth Circuit did not specifically analyze the due process issue. It appears, however, that the Fifth Circuit agreed with the Respondents' position because the Court refused to vacate the arbitration award even after acknowledging that several procedural irregularities occurred during the arbitration proceeding.

In *Totem Marine Tug & Barge, Inc. v. North Amer. Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979), the Fifth Circuit appeared to recognize the applicability of due process principles in arbitration proceedings. In that case, the appellant urged that it had been denied due process. The court, while acknowledging that arbitration is less formal than a trial in court, vacated the arbitration award based, in part, on the court's determination that the arbitrators had "dispensed their own brand of industrial justice." *Id.* at 652. In Peterson's case, as well as other recent

opinions,[16] the Fifth Circuit has moved away from the position that parties in arbitration are entitled to due process.

This Court has not definitively ruled on the applicability of due process in an arbitration proceeding. This Court's rulings, however, support a conclusion that parties to an arbitration, especially a proceeding conducted before the NYSE, are entitled to due process. *Commonwealth Coatings Corp.*, 393 U.S. at 148, 89 S.Ct. at 339 (the "broad statutory language" of the FAA effectively incorporates minimum constitutional protections on the fairness of the process); *Shearson v. McMahon*, 482 U.S. 220, _____ 107 S.Ct. 2332, 2341 (1987)(premising the arbitrability of securities claims partly upon the fact that the NYSE's arbitration procedures are subject to the SEC's oversight authority). There is no clear precedent from this Court on the due process issue. Consequently, review of this issue by this Court is warranted.

2. PETERSON WAS DENIED DUE PROCESS.

A fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner" *before a neutral and unbiased decision-maker. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Muse v. Sullivan*, 925 F.2d 785 (5th Cir. 1991). This Court has stated: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires *an absence of actual bias* in the trial of cases." *Antoniu v. S.E.C.*, 877 F.2d 721, 724 (8th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990)(*citing*, *In re Murchison*, 349 U.S. 133 (1955)(emphasis supplied). Peterson neither had a hearing before an impartial and unbiased tribunal nor an opportunity to be heard in a "meaningful manner." Such conduct is not mere procedural irregularity, but rather a fundamental denial of due process.

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[16] *See R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534 (5th Cir. 1992)(holding that an arbitration award can be vacated based only on statutory grounds).

After Peterson had presented most of his case, cross-examined Juba, and completed nine days of hearing testimony (over 2,000 pages of transcript), two of the original five arbitrators withdrew and the NYSE appointed two new panelists who had not heard the testimony and *who commenced hearing new testimony before reading transcripts of the first nine days of hearings*. This device just as effectively deprived Peterson of a meaningful hearing as if the panel had simply refused to allow him to put on witnesses or had by any other device refused to allow him to present his case in a cohesive manner.

Peterson's counsel explained the impropriety of having the case decided by panelists who had not heard all of the testimony and he asked the panel to allow him to present his entire case to the whole panel (2249). He further insisted that live observation of the witnesses was crucial (2252-53). Plaintiff continuously objected to the two-tier panel, out of order testimony, the lack of live observation of the witnesses, and related flaws (2239-2318, Vol. X).

Courts have held that if credibility is at issue, a fact finder who is substituted midstream in a proceeding must engage in a *de novo* hearing of all the evidence. *See, e.g., Henry A. Knott Co. v. The Chesapeake and Potomac Telephone Co.*, 772 F.2d 78, 85 (4th Cir. 1985)(substitute federal master must conduct *de novo* hearing, "otherwise the parties' right to a full due process hearing would be severely undercut"); *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F.2d. 106 (8th Cir. 1954)(substitute trial examiner not entitled to determine credibility based on cold record); *Emerson Electric Co. v. General Electric Co.*, 846 F.2d 1324 (11th Cir. 1988)(successor judge could not make credibility determinations based on cold record). Due to the rarity of verbatim transcripts in arbitrations, no case could be found where this issue arose in the arbitration context.

In *Feldman v. Board of Pharmacy*, 160 A.2d 100 (D.C. 1960), aff'd, 279 F.2d 821 (D.C. Cir. 1960), the court determined that the pharmacist had been denied due process

because four of the five board members present at the hearings had been replaced before a decision was rendered. The court noted that "the error is not cured by having the fact finder later read the transcript." *Id.* at 103.

As in *Feldman*, Peterson's case was highly dependent on the credibility of witnesses. The appointment of two new panelists in Peterson's case after nine days of hearing was more pernicious than any of the examples cited above. In Peterson's case there was a combination of (i) some panelists deciding based upon a cold transcript; (ii) a two-tiered panel where some of the members had heard all live testimony and some were of the lower "newly appointed" caste;[17] (iii) an insistence by the panel that testimony immediately proceed even before the new panelists had read the prior transcripts; and (iv) a necessary dependence upon transcripts in which the five original panelists had so interfered with the presentation of evidence and so clearly expressed their own biases as to taint any panelist reading those transcripts.

Because of the panel's refusal to allow Plaintiff to recall each witness, Peterson, who had previously been questioned for 2 or 3 days before the panel, was limited to a 45-minute description of his case, followed by 45 minutes for Respondent Juba. The next witness was the broker's manager, through whom Plaintiff intended to show the misconduct of the broker in breaking his own firm's rules (2295). The two new panelists could not understand the impeachment of Juba through his supervisor because they had not heard Juba's detailed testimony at Volumes VI through IX of the transcript. Further, they could not understand what proper supervisory procedures would have

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[17] The substitution of two unprepared panelists created a two-tiered panel - three members who had already been vigorously objected to on the second day of the hearing based upon their partiality and two subservient members who arrived in the middle of the case, without observing the demeanor of witnesses. The two new panelists had virtually no alternative, but to defer to the strongly expressed opinions of the other three panelists; not only had the first three heard all the evidence as it was being presented, but also two of those three continuing panelists (Baker and Guerin) were members of the securities industry, presumably armed with special understanding of securities matters.

been and compare this to this supervisor's testimony when neither had any familiarity with the testimony of Plaintiff's only witness as to the appropriate approval and supervisory procedures. In addition, since the two new panelists had read very little about the options positions Juba recommended, had not yet read Juba's admissions that the position was primarily his idea and was inconsistent with Peterson's prior positions, and had missed testimony by Juba, Bell, and Barry as to the rarity of the transaction, questions to the broker's manager as to the unusual character of the transaction had no contextual meaning.

Courts have held that federal judges, special masters, and administrative law judges who are highly skilled and trained at making fact findings cannot make fair determinations of credibility based on a cold record. Certainly, lay arbitrators, subjected to virtually no scrutiny by the NYSE, cannot perform such a task by "scanning" transcripts and hearing new evidence before reading prior days' transcripts. Peterson was denied due process.

Fairness of arbitration proceedings, especially those conducted before self-regulating organizations, is critical to the future viability of arbitration as an adjudicatory process. This Court has, in the past, determined that an arbitration forum is appropriate for determining securities disputes. *McMahon*, 107 S.Ct. at 2341; *Gilmer*, 111 S.Ct. at 1654. Those decisions were based in part on the assurance that the customer would be afforded a full and fair hearing. Through Peterson's case, this Court has the opportunity to explore and define the due process protection that must be afforded all participants to an arbitration proceeding. This important area of law, especially in light of the trend favoring arbitration as opposed to judicial resolution of disputes, should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, Petitioner prays that the Court issue a writ of certiorari to review the decision and judgment below.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-1341

M.K. PETERSON,

Plaintiff-Appellant,

versus

RAUSCHER PIERCE REFSNES, INC., ET AL,

Defendants,

RAUSCHER PIERCE REFSNES, INC., and RICHARD F. JUBA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(CA3-90-2339-P)

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge: *

After our study of the briefs in this case and after hearing oral arguments of counsel, we are convinced that the award of the arbitration panel should not be vacated. The circumstances under which an arbitration award will be set aside are extremely narrow. Judicial review of arbitration awards is extremely limited, and the standard of review applied by the district court is a very deferential one. *Anderman/Smith Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990). The district court denied Peterson's motion to vacate the arbitration award. We review *de novo* the district court's order. *Id.* at 1218 n. 2.

Peterson argues that the panel's award should be vacated because of the evident partiality of the arbitrators, because he was denied due process, because of the panel's manifest disregard for the law, and because of procedural irregularities

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

that prejudiced his rights. Peterson, however, has failed to convince us with any of these arguments that the arbitration panel's award should be set aside. Although Peterson has pointed out several procedural irregularities, we are not convinced that the fundamental fairness of the proceeding was undermined; in short, none are serious enough to warrant vacating the award. In concluding, we must observe that the basis for many of the claims raised in this appeal were provided by Peterson and his counsel. And, finally, we would note as an aside that we have been unimpressed with the merits of the claims asserted in the arbitration proceeding. The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-1341

M.K. PETERSON,
Plaintiff-Appellant,
versus
RAUSCHER PIERCE REFSNES, INC., ET AL.,
Defendants,
RAUSCHER PIERCE REFSNES, INC. and
RICHARD F. JUBA,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 1/14/93, 5 Cir., _____, _____ F.2d _____)
(February 17, 1993)
Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

PER CURIAM

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/_____
United States Circuit Judge

Judges KING and HIGGINBOTHAM did not participate in the consideration of the suggestion for rehearing en banc.

9 U.S.C. §10 **Same; vacation; grounds; rehearing**

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

July 30, 1947, c.392, 61 Stat. 672.

NYSE Rule 609. Peremptory Challenge

In any arbitration proceeding, each party shall have the right to one peremptory challenge. In arbitrators where there are multiple claimants, respondents and/or third party respondents, the claimants shall have one peremptory challenge and the third party respondents shall have one peremptory challenge, unless the Director or Arbitration determines that the interests of justice would be best served by awarding additional peremptory challenges. Unless extended by the Director of Arbitration, a party wishing to exercise a peremptory challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the person(s) named under Rule 619(d), (e) or Rule 608 whichever comes first. There shall be unlimited challenges for cause.

NYSE Rule 611. Disqualification or Other Disability of Arbitrators (existing when Peterson's arbitration was commenced)

In the event that any arbitrator, after the commencement of the first session but prior to the rendition of the award should become disqualified, resign, die, refuse or be unable to perform or discharge his duties, the Director of Arbitration, upon such proof as he deems satisfactory, shall, where permitted by law, either (a) appoint a new member to the panel to replace such arbitrator, obtaining the consent of the parties; or (b) with the consent or waiver of the parties, direct that the arbitration proceed without the substitution of a new arbitrator.

NYSE Rule 611. Disqualification or Other Disability of Arbitrators (effective May 10, 1989)

In the event that any arbitrator, after the commencement of the fist hearing session and prior to the rendition of the award, should resign, die, withdraw, be disqualified or otherwise be unable to perform as an arbitrator, the remaining arbitrator(s) may continue with the hearing and determination of the controversy, unless such continuation is objected to by any party within five (5) days of notification of the vacancy on the panel. Upon objection, the Director of Arbitration shall appoint a new member to the panel to fill any vacancy. The Director of Arbitration shall inform the parties as soon as possible of the name and employment history for the past ten (10) years of the replacement arbitrator, as well as information disclosed pursuant to Rule 610. A party may make further inquiry of the Director of Arbitration concerning the replacement arbitrator's background and within the time remaining prior to the next scheduled hearing session or the five (5) day period under Rule 609, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Rule 609.

AMICUS CURIAE

BRIEF

Supreme Court, U.S
FILED
JUN 15 1993
OFFICE OF THE CLERK

No. 92-1825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

M.K. PETERSON,

Petitioner,

vs.

RAUSCHER, PIERCE, REFSNES, INC. and RICHARD F. JUBA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF NEW YORK STOCK EXCHANGE, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTIONS PRESENTED

Whether a motion to vacate an arbitration award is properly denied where

(a) there is no basis for relief under the Federal Arbitration Act;

(b) the arbitrators did not display evident partiality;

(c) the arbitrators did not manifestly disregard the law; and

(d) there were no irregularities in the arbitration which undermined the fundamental fairness of the arbitration proceeding.

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BRIEF AMICUS CURIAE OF NEW YORK STOCK EXCHANGE, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

Interest of the Exchange

New York Stock Exchange, Inc. (the "Exchange") is, and has been since October 1, 1934, registered with the Securities and Exchange Commission as a national securities exchange pursuant to Section 6 of the Securities Exchange Act of 1934. The Exchange is the nation's largest securities exchange. The Exchange's Constitution and Rules, including its rules governing arbitration, are subject to supervision by the Securities and Exchange Commission. The Exchange was the sponsor of the arbitration which is the subject of the Petition. The Exchange was a defendant in the Texas State Court. That case was removed to the District Court below. A treble damage claim against the Exchange is pending there as a result of the Exchange's role as sponsor. The Exchange, pursuant to Rule 37.2 of the Rules of this Court, submits this brief amicus curiae in opposition to the petition for certiorari upon the written consent of all parties.

Statement of the Case

Petitioner M.K. Peterson's ("Peterson") claim upon the discretionary jurisdiction of this Court rests largely upon mischaracterizations of the arbitration proceedings. The arbitration took four years to complete because of Peterson's flagrantly obstructive behavior and repeated forays to court. A full statement of the case is necessary to reveal how far astray the Petition departs from the record.

Peterson commenced the arbitration in November, 1987 against respondents Raucher Pierce Refsnes, Inc. ("RPR") and Richard Juba. An award was not rendered until March 26, 1991. During those four years, Peterson waged a compaign against arbitration as a method of

alternate dispute resolution which included detours to both the Texas state court and the United States District Court in an attempt to enjoin and obstruct the arbitration process and to assert damage claims against the respondents and the Exchange. This behavior led the Court of Appeals to observe after completing its de novo review "that the basis for many of the claims [of procedural irregularities] asserted in this appeal were provided by Peterson and his counsel." Appendix 3A.

The Facts

Peterson commenced the arbitration by filing with the Exchange a statement of claim and an executed submission agreement in which he agreed to arbitrate his dispute with RPR and Juba arising out of the conduct by Juba of Peterson's customer's account at RPR. In January, 1988, RPR filed a reply to the statement of claim. The parties then engaged in extensive voluntary discovery. The arbitration hearings were set to begin on August 23 and 24, 1988 in Dallas, Texas.

The Exchange appointed a panel of five arbitrators to hear the case. In accordance with Exchange Rule 608, the background of each arbitrator was provided to the parties in advance of the hearing. Peterson exercised one peremptory challenge under Exchange Rule 609 to replace an arbitrator and successfully challenged another for cause. Exchange Rule 609 limited each party to one peremptory challenge. Appendix 6A. As prescribed by Exchange Rule 607, of the five panel members finally sworn, two had some securities industry affiliation. The other three were "public" arbitrators, who were persons of high standing in the community not affiliated with the securities industry. The panel had over thirty-three years of cumulative experience as arbitrators. The two arbitrators from the securities industry had extensive knowledge about the securities

industry but no financial ties to it. The other three of the five arbitrators were retired investors like Mr. Peterson.

The arbitration hearings began on August 23, 1988. Both sides gave lengthy opening statements. Peterson called as his first witness an expert on finance who had never been employed in the securities industry. Peterson testified next. The arbitrators asked reasonable questions of each witness. When the second day of the hearing began on August 24, 1988, Peterson's counsel asked the panel to stop hearing the case because Peterson believed that the panel was biased against him. The request was overruled. Peterson stated on the record:

> I want to say as a plaintiff that I have got an armload of clippings that says that under arbitration the claimant usually is working against a stacked deck. I want to give you my impression. When I came in here yesterday, I had the feeling that I was up against a stacked deck. That there was a feeling of hostility on the part of this panel. I won't say everybody, but the majority of this panel . . . . I'm not going to stand for it.

(336)[1]

The panel assured the arbitrants that they were not hostile but simply evaluating the evidence. Arbitrator Bonime said:

> The reason we ask questions is because we want to know what is going on. All we were trying to do is help bring this to light. We are not trying to chastise anyone or crucify anyone here. We want to know what

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1 All page citations are to the arbitration transcript.

> happened. Believe me, we are going to give everyone a fair shake.

(332) Peterson refused to proceed with his case. The panel advised Peterson that under Exchange Rule 616, whether he proceeded or not, the respondents would be permitted to present their case and the panel would render an award. Peterson continued his testimony.

Robert Clemente, an arbitration counsel employed by the Exchange, was in attendance at the first two days of hearing to assist the arbitrators in commencing the proceeding. He wrote a memorandum describing the first two days of hearings which was marked as a deposition exhibit and established to be a business record in the course of the ensuing litigation brought by Peterson. Mr. Clemente concluded:

> A thorough review of the transcript will reveal that, despite claimant's unusual approach, the panel patiently sat through in excess of four (4) hours of expert testimony while the claimant glared at each of them. It appeared from the moment claimant entered the hearing that the arbitrators and the arbitration process was on trial, not the case of Peterson v. Rauscher Pierce Refsnes Inc. & Richard F. Juba.

Ex. B, Collins Aff.; Morris Ex. 16, at 8. Peterson acknowledged during the hearings that he had hired a media publicist and had embarked on a crusade against arbitration (4032, 4034, 4037-38).

On October 13, 1988, Peterson filed suit in the Texas state court naming the Exchange, RPR and Juba as defendants. He sought to restrain the arbitration from proceeding and sought damages against RPR and Juba for the claims he was pursuing in the arbitration. Peterson

obtained a temporary restraining order prohibiting the arbitration from resuming on its next scheduled hearing date of November 7, 1988.

Upon expiration of the temporary restraining order, Peterson objected to the Exchange's scheduling additional hearing days until he had exhausted his efforts in state court to enjoin the arbitration. The arbitration finally resumed in July and August of 1989. Peterson then asked the arbitration panel to withdraw, complaining that the arbitration was taking too much time due to the difficulty of scheduling hearings for five arbitrators, the parties and their witnesses. His request was refused.

The hearings resumed on January 8, 1990. The panel sought to expedite the hearings but received no cooperation from Peterson. His response to a suggestion that the arbitration hearings be videotaped so that they could go forward if one or two arbitrators could not attend, with the absent arbitrators viewing the videotape before the next hearing, was met with this response from Peterson: "Rejected out of hand. No more looney-tunes" (1717).

In May, 1990, one arbitrator withdrew from the panel. Under Exchange Rule 611, the remaining arbitrators were empowered to determine the controversy unless any party insisted on a replacement. Appendix 8A. Peterson demanded a panel of five. The Exchange appointed Eugene Zorn as a replacement. Peterson exercised a peremptory challenge against Zorn. Despite the fact that Peterson had used his one allotted peremptory challenge earlier, the Exchange replaced Zorn with Carol Galbraith, a retired university administrator.

On June 28, 1990 Peterson again filed a motion in the Texas state court to enjoin the arbitration from going forward. On July 9, 1990, the state court declined to interfere. Shortly before the arbitration was scheduled to resume, another arbitrator withdrew. The Exchange

replaced that arbitrator with Joseph Shepherd. Peterson exercised a peremptory challenge against Mr. Shepherd. The Exchange attempted to honor Peterson's challenge even though he did not by right have any additional peremptory challenge. Jeffrey Ritter was named as replacement arbitrator. Mr. Ritter appeared at the July 10 hearing but voluntarily withdrew before testimony resumed because he could not spare sufficient time from his law practice to permit prompt completion of the hearing (2256, 2260-61). Unable to find another panelist who could commit the required time, the Exchange reappointed Zorn as replacement arbitrator. Peterson again asserted a peremptory challenge against Zorn. The Exchange then replaced Zorn with Shepherd but declined to recognize any further peremptory challenges from Peterson pursuant to Exchange Rules 611 and 609 (Appendix 8A, 6A). Peterson could show no basis to challenge Shepherd for cause. Shepherd remained a panel member.[2]

During the July 10 hearing, Peterson refused to agree that the panel be reduced to three members to expedite the hearings even though the two securities industry arbitrators each offered to resign (2275-76, 2278, 2285).

The hearing resumed on July 11, 1990. By agreement, the substance of prior testimony was repeated in narrative form together with brief additional cross-examination to bring the two new arbitrators up to date and to refresh the original three remaining arbitrators (2348-2493). After the July hearing sessions, Galbraith and Shepherd, the new panel members, were provided with full

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[2] Shepherd's profile showed that he was a graduate of Vanderbilt University who had been a vice president in sales at Lone Star Steel Company in Dallas, Texas from 1957 until 1986. Shepherd had three years experience as an arbitrator.

sets of transcripts and exhibits and the opportunity to require any witness who had previously testified to be recalled. The new panel members did not make such a request because Peterson recalled his two expert witnesses who had previously testified to repeat and supplement their testimony before the new panel members (3606-3708, 3800-3938). After the July sessions, the hearings proceeded regularly each month.

On September 7, 1990 Peterson filed an amended petition in the Texas state court seeking injunctive relief against the arbitration proceedings and including damage claims against RPR and Juba based upon the RICO statute and treble damages against the Exchange for violation of the Texas Deceptive Trade Practices Act. This action was removed by defendants to the United States District Court for the Northern District of Texas.

The arbitration continued. On November 6, 1990, Peterson called his last witness. At the time Peterson rested, his case in chief took up 4279 pages out of a total transcript of 5422 pages. He had called four expert witnesses. Twenty-one hearing days had been held.

The arbitration panel heard lengthy closing arguments for one day. Both sides were permitted to file closing briefs of unlimited length. Approximately thirty days after receipt of the closing briefs, on March 26, 1991, the arbitration panel rendered a unanimous award in favor of respondents.

Peterson then moved in the case before the District Court to vacate the arbitration award. RPR and Juba cross-moved to confirm the award pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (1988). On March 23, 1992, the District Court entered an order confirming the award and denying Peterson's motion to vacate. The District Court held:

> After reviewing the entire record of this case the Court has failed to find any bias or impartiality on the part of any of the arbitrators . . . .

Additionally, the Court held:

> The Court is also convinced after thorough review of the record that Peterson has failed to show that the arbitration proceedings were fundamentally unfair.

Order at 2. Peterson then appealed to the Court of Appeals for the Fifth Circuit. In affirming, the Court of Appeals said:

> Peterson, however, has failed to convince us with any of [his] arguments that the arbitration panel's award should be set aside. Although Peterson has pointed out several procedural irregularities, we are not convinced that the fundamental fairness of the proceeding was undermined; in short, none are serious enough to warrant vacating the award.

The Court of Appeals added:

> the basis for many of the claims raised in this appeal were provided by Peterson and his counsel. And, finally, we would note as an aside that we have been unimpressed with the merits of the claims asserted in the arbitration proceeding.

Appendix 3A.

Peterson then petitioned the Court of Appeals for rehearing and alternatively rehearing en banc. Peterson's petition was denied. Appendix 4A.

REASONS FOR DENYING THE WRIT

I

THIS CASE IS NOT APPROPRIATE FOR A GRANT OF CERTIORARI

Certiorari will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 10. The concept of "importance" relates to the importance of the issues to the general public rather than their importance to the particular parties involved. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923); Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955). Even the existence of admittedly "serious legal questions" may not be sufficient. English v. Cunningham, 361 U.S. 905, 907 (1959).

Peterson has neither argued nor suggested circumstances compelling the conclusion that this case is important to anyone other than to Peterson. The standards governing the exercise of this Court's discretionary power of review are not met.

Peterson first argues that the Exchange's alleged violation of its rules renders the arbitration award invalid and that the Court of Appeals' refusal to vacate on this ground is in conflict with the decisions of this Court and with other Courts of Appeals. Peterson, however, does not cite one case with which the decision of the Court of Appeals conflicts. There is no merit to Peterson's claims that alleged violation of an arbitral sponsor's rules is a basis for vacation of an arbitration award. Peterson is merely attempting to evade the Federal Arbitration Act's ("FAA")

well-settled principles that arbitration awards will only be vacated on the extremely narrow grounds enumerated in the FAA. R.M. Perez & Assocs., Inc. v. Welch, 960 F.2d 534 (5th Cir. 1992).

Moreover, even if the Exchange's appointment of arbitrators were inconsistent with its rules (which it was not), Peterson fails to demonstrate how he was prejudiced, or, if so, why resolution of this matter by this Court is of any public importance. There are no "special and important" circumstances justifying a grant of certiorari.

Peterson next argues that the Court of Appeals' rejection of the "manifest disregard of the law" doctrine as a basis for vacatur conflicts with decisions of this Court and other Courts of Appeals. This argument fails. First, there is no merit to the argument that there was a manifest disregard of the law. There is no evidence in the record that arbitrators "correctly stated the law and then proceeded to ignore it." Siegel v. Titan Indus. Corp., 779 F.2d 891, 893 (2d Cir. 1985). Second, contrary to plaintiff's assertion, this Court has not held that "manifest disregard" is a separate basis for vacating an arbitration award. The Court of Appeals decision does not conflict with any decision of this Court. Moreover, the Court of Appeals in this case indicated after a de novo review of the record that it considered Peterson's arguments, including "manifest disregard" of the law, and that "Peterson . . . has failed to convince us with any of these arguments that the arbitration panel's award should be set aside." Courts of Appeal may differ on whether they apply the "manifest disregard" standard or some other phraseology. These differences have been deemed insignificant, amounting to a basic "fundamental fairness" analysis. See Advest Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990). The Court of Appeals applied this standard to its analysis of Peterson's alleged procedural irregularities when it stated: "we are not convinced that the fundamental fairness of the proceeding

was undermined." Appendix 3A. The Court of Appeals added that: "we would note as an aside that we have been unimpressed with the merits of the claims asserted in the arbitration proceeding." Id. As there is thus no "real and embarrassing conflict . . . between the circuit courts of appeal," Layne, 261 U.S. at 393, the issue does not merit review by this Court.

Peterson also makes the argument that the Court of Appeals erred by concluding that evident partiality requires a showing of an arbitrator's pecuniary interest in the outcome or an actual relationship with a party. The Court of Appeals -- in this case -- made no such finding. Instead, it held that "the fundamental fairness of the proceeding was [not] undermined" and that Peterson failed to convince the Court that the arbitrators displayed "evident partiality."

Finally, Peterson contends that the Court of Appeals erred in refusing to vacate the arbitration award on due process grounds. The Court of Appeals, however, properly recognized that with this argument, Peterson is merely "dressing up" with constitutional clothing his other arguments. The FAA does not permit courts to "roam unbridled" in their review of arbitration awards[3], Advest, 914 F.2d at 8, but rather limits judicial intervention to cases where the award was tainted in some way, such as where the award was procured by corruption or fraud, or where the arbitrators demonstrated evident partiality, were guilty of misconduct or had exceeded their powers. 9 U.S.C. § 10(a). Peterson attempts to argue that the statutory

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3 Moreover, "'[i]t is a settled principle governing this subject, and which ought never to be lost sight of, that all reasonable intendments and presumptions are indulged in support of awards.'" Sperry Int'l Trade, Inc. v. Government of Isr., 689 F.2d 301, 306 (2d Cir. 1982) (quoting Fudickar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 401 (1875)).

grounds under which an arbitration award may be vacated include a violation of the Exchange's rules and due process. No court has ever held that an arbitration award may be vacated on these grounds.

II

THE DECISION BELOW IS CORRECT

A. The Award May Not Be Vacated Under the Federal Arbitration Act

Judicial review of arbitration awards is extremely limited, Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2799 (1991). For an arbitration award to be vacated it must fall within the narrow scope of the FAA. R.M. Perez & Assocs., Inc. v. Welch, 960 F.2d 534 (5th Cir. 1992); Robbins v. Day, 954 F.2d 679 (11th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 201 (1992); Fairchild & Co. v. Richmond, F.&P. R.R., 516 F. Supp. 1305, 1312 (D.D.C. 1981). As stated by the Court of Appeals for the Fifth Circuit in Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990): "judicial review of a commercial arbitration award is limited to . . . Sections 10 and 11 of the Federal Arbitration Act."

The FAA provides that a district court may vacate an award where: (1) the award was procured by corruption, fraud, or undue means; (2) the arbitrators demonstrated evident partiality or corruption; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers. 9 U.S.C. § 10(a). In determining whether the party seeking to vacate the award has met its burden of establishing one of the grounds required under the FAA, the court should address whether the arbitration proceedings were "fundamentally unfair." Forsythe, 915 F.2d at 1022-23.

Peterson has failed to satisfy the standards necessary to vacate an arbitral award under the FAA.

B. Violation of an Arbitral Sponsor's Rules Is Not a Valid Ground for Vacatur and Cannot Be Established Here in Any Event

Peterson argues that the arbitrators violated Exchange Rule 611 because two arbitrators whom he had peremptorily challenged were later designated by the Exchange to replace another panelist who resigned.

Peterson contends that, under Exchange rules, once he struck an arbitrator peremptorily, the Exchange was prohibited from appointing that individual to the panel at any subsequent time in the arbitration. Peterson offers no evidence or legal support for his interpretation of the Exchange's rules, and the record demonstrates that the Exchange was properly applying its rules concerning the resignation of arbitrators and appointment of replacement arbitrators and, indeed, going beyond the rules to find a panelist acceptable to Peterson.

Exchange Rule 611 was amended, effective May 10, 1989, long before the vacancies on the Peterson panel arose or were filled. The Exchange expressly provided that the amended Rule 611 would become effective immediately. See SEC Exchange Act Release No. 26805, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,414, at 80,114 n.61 (May 10, 1989). Under amended Rule 611, the Exchange was not required to obtain the parties' consent to a replacement panelist. Peterson was entitled to one peremptory challenge. See Appendix 6A-8A. He was accorded four. It is axiomatic that securities exchanges should be allowed "broad discretion" in interpreting and applying their own rules. See, e.g., Intercontinental Indus., Inc. v. American Stock Exch., 452 F.2d 935, 940 (5th Cir. 1971), cert. denied, 409 U.S. 842 (1972).

Moreover, the alleged failure by Exchange to follow its rules of arbitration do not provide grounds for vacating an arbitration award. In Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir.), cert. denied, 464 U.S. 1009 (1983), the Court stated that the rules of Arbitration of the American Arbitration Association ("AAA") and the arbitrator's code of ethics do not have the force of law, and even an assumed violation of those rules and code would fail to satisfy the narrow statutory prerequisites to vacate an award under the FAA. 714 F.2d at 680-81 (Posner, J.). See also Ketchum v. Prudential-Bache Sec., Inc., 710 F. Supp. 300, 303 (D. Kan. 1989) (holding that an Exchange rule violation would not warrant vacation of an arbitration award because "the rules do not have the force of law and a rule violation is not one of the enumerated statutory bases for vacating an arbitration award").

The cases on which Peterson relies for the proposition that an arbitration award may be vacated for "improperly composed arbitration panels" are inapposite. All involve instances in which arbitrators were appointed in contravention of the terms of the parties' agreement.

C. "Manifest Disregard of the Law" Is Not a Valid Ground for Vacatur and Cannot be Established Here in Any Event

The "manifest disregard" doctrine derives from dicta employed by the Court in Wilko v. Swan, 346 U.S. 427, 436-37 (1953), in which this Court found that "interpretations of the law" by arbitrators were not subject "to judicial review for error in interpretation." In so holding, it contrasted misinterpretation with "manifest disregard" of the law. Id. Subsequent Supreme Court decisions have relied on the "manifest disregard" dicta as a basis for vacating an arbitration award under the Federal Arbitration Act. See, e.g., Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147 (1968). While this Court mentioned the "manifest disregard" standard most recently in

Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 231 (1987), it did not recognize this standard as a separate basis for vacating an award under the FAA.

The line of review developed by some lower courts out of the Wilko language is a judicially created one, not found in the FAA, 9 U.S.C. § 10. Advest, Inc. v. McCarthy, 914 F.2d 9 n.5 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986); Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 634 (10th Cir. 1988)). The Court of Appeals for the Fifth Circuit has declined to adopt the "manifest disregard" standard, preferring to limit its inquiry to the grounds enumerated under the FAA. See 9 U.S.C. § 10. In its opinion the Court of Appeals noted that Peterson argued that the arbitration should be vacated "because of the evident partiality of the arbitrators, because he was denied due process, because of the panel's manifest disregard for the law, and because of procedural irregularities that prejudiced his rights," but that "Peterson, however, has failed to convince us with any of these arguments." Appendix 3A The Court of Appeals thus rejected plaintiff's "manifest disregard of the law" argument based on the facts of this case.

Peterson correctly states that the standard of judicial review of arbitration awards "has taken on various hues and colorations in its formulations" in the Courts of Appeal. Advest, 914 F.2d at 9; see also Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992) (arbitration award may be set aside if "arbitrary and capricious"), cert. denied, ___ U.S. ___, 113 S. Ct. 1269 (1993); A.G. Edwards & Sons v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992) (arbitration award may be set aside if made in "manifest disregard for law"), cert. denied, ___ U.S. ___, 113 S. Ct. 970 (1993); French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986) (arbitration award may be set aside if "completely irrational"); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363

U.S. 593, 597 (1960) (holding arbitration award to be impregnable "so long as it draws its essence" from the underlying agreement).

These differences in phraseology have, however, been deemed insignificant. See, e.g., Advest, 914 F.2d at 9. Regardless of the terms of art employed, the arbitration award has been subjected to a "sort of 'abuse of discretion' standard" to ensure that the arbitrator's decision is based on his interpretation of the contract rather than on his "own beliefs of fairness and justice." Jenkins, 847 F.2d at 633-34. As stated by the Court of Appeals for the First Circuit in Advest, 914 F.2d at 9:

> [T]he standard of review undergirding these various formulations [is] identical, no matter how pleochroic their shadings and what "terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice." Jenkins v. Prudential-Bache Securities, Inc., 847 F.2d 631, 634 (10th Cir. 1988). However nattily wrapped, the packages are fungible.

Moreover, those courts applying the "manifest disregard" standard have held that it is more than the mere erroneous application of the law that will mandate vacatur of an arbitration award. See A.G. Edwards, 967 F.2d at 1403 (an arbitration award should not be set aside "even in the face of erroneous interpretations of the law"). To vacate an award under this standard, the panel must have understood and correctly stated the law and then proceeded to ignore it. Siegel v. Titan Indus. Corp., 779 F.2d 891, 893 (2d Cir. 1985). See Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 112 (2d Cir. 1993) (to vacate an arbitration award the arbitrators must have known of the legal principle and wilfully refused to apply it); Bobker, 808 F.2d at 933 ("[E]rror must have been obvious and . . .

instantly perceived by the average person qualified to serve as an arbitrator.") The party seeking to vacate the award must demonstrate that the arbitrator deliberately disregarded what he or she knew to be the law in order to reach a particular result. National Wrecking Co. v. International Bhd. of Teamsters Local 731, 143 L.R.R.M. (BNA) 2046, 2049 (7th Cir. 1993) (citing Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992)).

Peterson has not demonstrated that the arbitrators correctly stated the law and proceeded to ignore it. Nor has he shown that the arbitrators deliberately disregarded what they knew to be the law in order to reach a desired outcome. While Peterson quotes out of context remarks made by the arbitrators over the course of a 21-day arbitration hearing, these statements do not reveal that the arbitrators stated or knew the applicable law, and then proceeded to ignore it. Rather, the arbitrators recognized that they are not bound by the procedural rules of the courts but by those of the Exchange (4085, 417). See, e.g., National Post Office Mailhandlers v. United States Postal Serv., 751 F.2d 834, 841 (6th Cir. 1985) ("Arbitrators are not bound by formal rules of procedure and evidence . . . .").

D. The Court of Appeals Did Not Err by Holding that the Arbitrators Were Not Disqualified by "Evident Partiality"

Peterson argues that because the Court of Appeals did not find that the arbitrators displayed "evident partiality," that the court must have limited the "evident partiality" test "to instances in which an arbitrator had a financial interest in the outcome or a special relationship with one of the parties." Petition 23. For Peterson to impute reasoning to the court's decision, not reflected in the court's opinion, and then to proceed to frame an argument around this conjecture, is irresponsible. There is

nothing to suggest that the Court of Appeals limited its inquiry into "evident partiality" to the pecuniary interests of the arbitrators. To the contrary, the court stated: "Peterson argues that the panel's award should be vacated because of the evident partiality of the arbitrators . . . Peterson, however, has failed to convince us with any of these arguments." Appendix 3A. It is thus not respondents' arguments that swayed the Court of Appeals -- as suggested by Peterson -- but the rejection of Peterson's arguments.

Peterson argues that the arbitrators must have been biased against him because they interrupted his testimony, stated their opinions regarding witness testimony and questioned Peterson's expert witness. Courts have long recognized, however, that arbitration need not follow all the "niceties" of the federal courts, but need only provide a fundamentally fair hearing. Grovner v. Georgia-Pacific Corp., 625 F.2d 1289, 1290 (5th Cir. 1980). A losing party's perception of rudeness on the part of an arbitrator is not the "evident partiality" envisioned by the FAA as a basis for vacating an arbitration award. Fairchild, 516 F. Supp. at 1312 (award not vacated despite allegation that arbitrator had expressed hostility to losing party's counsel demonstrated by rudeness and interruptions during the arbitration proceedings); see Prudential Real Estate Affiliates, Inc. v. Prudential MGM Realty, Inc., 959 F.2d 241 (9th Cir. 1992) ("[N]o case has ever held that an arbitrator's statements in the record can constitute errors 'on the face of an award.'"); Fort Hill Builders v. National Grange Mut. Ins. Co., 866 F.2d 11, 13 (1st Cir. 1989) (award not vacated despite arbitrators' hostile conduct and comments).

Mr. Justice White, concurring in Commonwealth Coatings, 393 U.S. at 150, which is cited in the Petition (pp. 15, 25), cautioned that:

> The court does not decide today that arbitrators are held to the standards of

> judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function.

Further, while Peterson invokes Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), aff'd in part and rev'd in part, 514 F.2d 285 (2d Cir.), cert. denied, 423 U.S. 892 (1975), for the proposition that a court should review an arbitration transcript for "evident partiality," there is nothing to suggest that the courts below did not do so. This Court does not perform such tasks. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) ("Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts").

E. The Court of Appeals Did Not Err by Refusing to Vacate the Arbitration Award on Due Process Grounds

Peterson seeks to have the award vacated on the additional theory that he was denied due process of law. Due process requirements under the United States Constitution do not, however, attach to civil arbitration proceedings sponsored by self-regulatory organizations such as Exchange or the NASD. See, e.g., First Heritage Corp. v. National Ass'n of Sec. Dealers, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,596 (E.D. Mich. Feb. 5, 1992); Bahr v. National Ass'n of Sec. Dealers, Inc., 763 F. Supp. 584 (S.D. Fla. 1991). Other courts similarly recognize that due process is not the yardstick against which to measure arbitration proceedings. See, e.g., Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 268 (7th Cir. 1988) (arbitration is a system "structured without due process"); Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir.) (same), cert. denied, 476 U.S. 1141 (1986).

Peterson was afforded great latitude in presenting his case. He was not denied either fairness or due process. Peterson was permitted more peremptory challenges than the rules accorded him. Although the arbitrators at times questioned the relevance or usefulness of his evidence, Peterson was allowed to present all his evidence. Peterson was also permitted to put on not one, but two, securities experts twice, allegedly to educate the panel about options transactions. Peterson was permitted 18 days of hearings to develop his case. He was given notice of all proceedings, and was represented by counsel, who was permitted to cross-examine the witnesses proffered by RPR. A careful examination of the record of these lengthy proceedings reveals that the panel bent over backward to afford Peterson every opportunity to present his case and to judge it fairly.

CONCLUSION

There is nothing in this case that calls out for this Court's attention. The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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